



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 10, 2004

Ms. Mia Settle-Vinson  
Assistant City Attorney  
City of Houston  
P. O. Box 1562  
Houston, Texas 77251-1562

OR2004-6766

Dear Ms. Settle-Vinson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 206748.

The City of Houston (the "city") received a request for information related to the Electric Supply Agreement. You inform us that the requestor subsequently modified the request to exclude the information submitted to this office in Exhibits 3B and 3C. Thus, these documents are nonresponsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

You claim that the responsive information may be excepted from disclosure pursuant to sections 552.101, 552.104, 552.110, 552.113, and/or 552.131 of the Government Code, but make no arguments and take no position as to whether the information is so excepted. You inform us that the city notified the third parties whose proprietary interests may be implicated by the request, of the city's receipt of the request and of each third party's right to submit arguments to us as to why any portion of the remaining requested information should not be

released to the requestor.<sup>1</sup> *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the claimed exceptions and have reviewed the submitted information.

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The land office asserts that it has specific marketplace interests in the information at issue because the land office is authorized by statute to utilize royalties taken in kind to convey power directly to its public retail customers. Tex. Util. Code § 35.102. The land office informs us that under this authority, it has created the State Power Program through which it competes in the electrical energy marketplace to supply electrical energy public retail customers. The land office also informs us that it "competes with other private companies for the awards of these contracts." Based on these representations, we conclude that the land office has demonstrated that it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. *See* ORD 593.

The land office also asserts that release of the information at issue would harm its marketplace interests. The land office informs us that the information at issue reveals how it provides its customers with electrical energy. The land office asserts that, if its competitors had access to this information, they would "be able to use the [land office's] methods of delivery of electrical services and its pricing formula for such services as their own." The land office further contends that the "competitors could use this information to structure their

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<sup>1</sup>The third parties that were notified pursuant to section 552.305 are Constellation NewEnergy, Inc. ("Constellation"), Reliant Energy Solutions ("Reliant"), the Texas General Land Office (the "land office"), and TXU Energy ("TXU"). The modified request excludes information related to Constellation and TXU.

own proposals for future electrical customers” to better compete against the land office. It also informs us that the land office “working with Reliant is able to offer unique products, services and pricing formulas in the competitive marketplace of electric energy” and contends that allowing competitors access to this information will undermine the land office’s ability to compete in this marketplace. Based on the land office’s representations and arguments, we conclude that the land office has shown that release of the information it seeks to withhold will bring about specific harm to the land office’s marketplace interests. *See* ORD 593. Accordingly, the information that we have marked is excepted from public disclosure under section 552.104.

Reliant claims that portions of the remaining submitted information relating to it are excepted from disclosure pursuant to section 552.110 of the Government Code. The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a person’s trade secret claim under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> *See* Open Records Decision

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<sup>2</sup> The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;

No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret. Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Based on Reliant’s arguments and our review of the information at issue, we find that Reliant has sufficiently demonstrated that portions of the submitted information relating to it constitute trade secret information or commercial and financial information, the release of which would cause the company substantial competitive harm. Accordingly, we conclude that the city must withhold the information that we have marked pursuant to section 552.110 of the Government Code. However, we also find that no portion of the remaining submitted information constitutes trade secret information or commercial or financial information, the release of which would cause Reliant substantial competitive harm under section 552.110. *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience). Accordingly, we also conclude that the city may not withhold any portion of the remaining submitted information under section 552.110 of the Government Code.

In summary, the marked information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. The remaining responsive information must be released to the requestor.

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(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

The land office has requested that we issue a previous determination for the responsive information. However, we decline to do so at this time. Accordingly, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/krl

Ref: ID# 206748

Enc. Submitted documents

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